

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: M461/16

In the matter between:

**KOPANOMOLEFE TRADING CC
L. E. MOLEFE**

**1ST APPLICANT
2ND APPLICANT**

And

**J. J. JOOSTE
C. M. JOOSTE
NOORDWES BUILDING AND CONSTRUCTION**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

J U D G M E N T

DJAJE J
Introduction

[1] The applicants brought this matter for a relief in the following terms:

- “(a) The 1st and 2nd respondents render a full account supported by vouchers of the business of the 1st applicant for the period commencing on the 8th March 2011 up to and including 8th April 2014;*
- (b) Debate of the said account;*
- (c) Payment to the 1st applicant of whatever amount appears to be due to the 1st applicant upon debate of the account;*
- (d) Interest on the monies a tempore morae from date of this order until date of payment.”*

Background

[2] The first applicant was established by the second applicant and in 2011 the first respondent and the second respondent were added as members together with others. At that time the second applicant held 31% shares in the first applicant with the first respondent holding 24% and second respondent 20%. The rest of the shareholding was with the other members of the first applicant. The second applicant together with the first respondent were the only members at that time who had signing powers on the bank account of the first applicant. Currently there are only two members of the first applicant, being the second applicant and his wife as the other members have resigned including the first and second respondents.

Submissions

[3] The submission by the second applicant is that notwithstanding the fact that only he and the first respondent had signing powers to the bank account of the first applicant, the first and second respondents somehow made it possible for only the two of them had effective access to the said bank account. Further that the respondents constantly

changed the pin codes for internet banking and appointed a bookkeeper who was controlled by them. It was argued that when the respondents resigned from the first applicant they advised clients not to trade with the first applicant anymore. As a result, the first applicant became embroiled in debt and struggles to trade. The submission by the second applicant was that after the respondents resigned he realized that between the period **08/03/2011** and **08/04/2014** there were transfers of money totaling R2 095 025.66 (two million ninety five thousand twenty five rand and sixty six cents) from the bank account of the first applicant to the third respondent without valid reason. The second applicant argued that there was no contractual arrangement between the first applicant and the third respondent to warrant the transfer of the said money. The second respondent is a member of the third respondent.

- [4] The second applicant contended that from the bank statements of the first applicant it is apparent that cheques in favour of the first and second respondents were cashed frequently with no relation to the business of the first applicant. Further to that, the second applicant submitted that ATM withdrawals and supermarket payments which had nothing to do with the business of the first applicant were made by the first and second respondents. It is the applicant's case that it is apparent from the above transactions that both respondents were using the first applicant's account fraudulently to cause financial harm.
- [5] The respondents in answering to the allegations by the applicants raised several legal points. The first one being that the second applicant does not have authorization from the first applicant to institute legal

proceedings and or depose to an affidavit on its behalf. It is the respondents' argument that the resolution attached to the founding affidavit does not authorize the second applicant to institute legal proceedings but rather that it authorizes him to sign all documents on behalf of the first applicant. There was no replying affidavit by the applicants, however, during argument counsel for the applicants argued that in terms of section 54 of the Close Corporation Act 69 of 1984 a member of a Close Corporation is an agent of the corporation and his acts bind the corporation. Further that it is not necessary to have special authorization for a member to bind the Close Corporation.

[6] Section 54 of the Close Corporation Act states that:

“54 Power of members to bind corporation

- (1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.
- (2) Any act of a member shall bind a corporation whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.”

[7] On the basis of the above quoted section it seems the second applicant as a member of the first applicant acts as its agent in dealing with the respondents and therefore his actions bind the first applicant. I do find merit in the argument by the applicants and of the view that the legal point raised by the respondents stands to be dismissed.

[8] The second point in law raised by the respondents was that the applicants failed to establish a cause of action on the basis that the

respondents are no longer members of the first applicant and no contractual obligation exists in terms of which they can be expected to deliver an account to the applicants. Further that the applicants have not placed before court substantial allegations establishing a breach of fiduciary duty and or negligent conduct by the first and second respondents. In contention the applicants' submission was that the first and second respondents as members of the first applicant had access to the bank account of the first applicant and transacted on it, this therefore implies that they had fiduciary duty towards the first applicant. In arguing this point the applicants referred me to the matter of **Phillip v Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465** at page 477 where the following was stated:

"There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship (cf Bellairs v Hodnett and Another 1978 (1) SA 1109 (A) at 1130F)."

[9] The respondents did not deny having access to the bank account of the first applicant and that indeed payments were made to the third respondents of which the second respondent is a member. As members of the first applicant the respondents owed it fiduciary duty in all transactions. Whether there was a breach of the fiduciary duty is an issue I will deal with in the merits. Consequently the second point in law by the respondents is dismissed.

[10] As a third point in law raised by the respondents is the request for documents. It was argued that the applicants seek a relief for the rendering of an account supported by vouchers of the business of the

first applicant for the period **8 March 2011 to 8 April 2014**. It is the respondents' case that all the financial records of the first applicant were duly handed over by the previous bookkeeper of the first applicant to the newly appointed bookkeeper of the first applicant. Further that the said records consisted of all the financial statements and all vouchers in respect of payments made on behalf of the first applicant. In contention the applicants argued that the nature of this application is not only for records to be discovered but for such records and accounts to be debated. Further that such information contained in the records be reduced to a report explaining why the expenditures were made and to who.

[11] In explaining the nature of the claim the applicants correctly referred to the case of **Doyle and Another v Fleet Motors P.E (Pty) Ltd 1971 (3) AD** where the following was stated:

"1. The plaintiff should aver-

(a) his right to receive an amount, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account

2. On proof of the a foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances that they be made available for inspection by the plaintiff. The Court may define the nature of the account.

3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach if for further directions if need be. Ordinarily the parties should first debate the account between

themselves. If they are unable to agree upon the outcome; they should, whether by pre-trial conference or otherwise, formulate Judgement would be according to the Court's finding on the facts.

4. *The Court may, with the consent of both parties, refer the debate to a referee in terms of section 19 bis (1) (b) of the Supreme Court Act, 59 of 1959.*
5. *If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency in order to decide whether to order the rendering of a proper account.*
6. *Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).*
7. *In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require."*

[12] The point in law raised on the request of documents goes directly to the heart of this application. In dealing with it I will also deal with the merits of the application. Our law recognises a cause of action based on a claim to an account and the debatement thereof. The real object of such claim is to obtain payment of an amount which the applicants believe is due to them. In this matter it is not disputed that the respondents are former members of the first applicant and had access to the bank account of the first respondent. The respondents argued that indeed payments were made from the account of the first applicant into the account of the third respondent of which the second respondent is a member. According to the respondents every payment that was made to the third respondent was with the permission of the second applicant. Further that the third respondent had to assist the first applicant in conducting business with several

creditors as the first applicant did not qualify for credit from several credit providers. It was submitted that the third respondent was utilized as a vehicle to secure credit agreements for the applicant by purchasing material and goods on behalf of the first applicant and thereafter the first applicant would pay the third respondents.

- [13] As referred to in the case of **Doyle** *supra*, if it appears from the pleadings that the applicant has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency in order to decide whether to order the rendering of a proper account. In this matter, the second applicant argued that the account received is insufficient as it is based on 'raw source documents'. It is clear that there were transactions that the respondents were involved in with the first applicant and the third respondent. The second applicant has not disputed that financial statements were provided by the respondents but contended that there are no explanations to the said statements. The respondents maintain that the second applicant was aware of all payments made to the third respondent which implies that there must be explanations for the said payments. The documents that the second applicant attached to the founding affidavit are a list of transfers, cheque payments and ATM withdrawals with no explanation of what the payments were for. All that the second applicant requires is for the statements to have accompanying vouchers and be reduced into a report or in writing explaining why the expenditures were made.
- [14] The second applicant as a member of the first applicant is entitled to accounts of the first applicant from the respondents with whom he had a contractual relationship by virtue of them being former

members of the first applicant and having being involved in its finances. It is therefore my view that the second applicant has satisfied the requirements stated in **Doyle v Fleet Motors** *supra* and the application should succeed.

[15] During argument the applicants rightfully so abandoned prayers (c) and (d) of the notice of motion as the court cannot order payment when the rendering of account and debatement thereof has not been done.

Costs

[16] There is no reason why costs should not follow the result.

Order

[17] Consequently, I make the following order:

1. The first and second respondents are ordered to render a full account supported by vouchers of the business of the first applicant for the period commencing **8 March 2011** up to and including **8 April 2014**;
2. Debatement of the said account.
3. First and second respondents are ordered to pay costs.

J T DJAJE

JUDGE OF NORTH WEST HIGH COURT

APPEARANCES

DATE OF HEARING : 31 AUGUST 2017

DATE OF JUDGMENT : 22 SEPTEMBER 2017

COUNSEL FOR APPLICANTS : MS L MBANJWA

COUNSEL FOR THE RESPONDENTS : ADV MAREE

